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In The

Supreme Court of the United States

October Term, 1977

No. 77-803

WILLIAM G. BARRY,
as Chairman of the New York State
Racing and Wagering Board, *et al.*,

Appellants,

— against —

JOHN BARCHI,

Appellee.

On Appeal from the United States District Court
for the Southern District of New York

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE HARNESS HORSEMEN INTERNATIONAL, INC.

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MOTION OF THE HARNESS HORSEMEN INTERNATIONAL, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 42(3) of the Rules of this Court, Harness Horsemen International, Inc., respectfully moves the Court for leave to file a brief *Amicus Curiae* in the above entitled case. Counsel for Appellants has not replied to movant's letter requesting consent, however, he has stated that he will not oppose this motion. The counsel for the Appellee has granted his consent.

Interest of Harness Horsemen International, Inc., *Amicus Curiae*

Harness Horsemen International, Inc., is a non-profit organization incorporated, duly organized and existing

under and by virtue of the laws of Washington, District of Columbia, in 1965.

The purpose for which Harness Horsemen International, Inc., is organized is to promote the sport of harness racing in the United States, Canada and other countries, and in so doing to do the following:

> (1) To cooperate with all authority charged with the government of harness racing in any locality, state, province, or country, whether such authority be governmental or private, and to render such authority all possible assistance in its duties; and to recommend to such authority changes in rules and regulations which, after due consideration by Harness Horsemen International, Inc., are in its opinion, in the best interests of the sport of harness racing;
>
> (2) To cooperate with and have as its members individuals, associations and corporations interested in the sport of harness racing; to disseminate information; to encourage the exchange of ideas and otherwise to suggest and promote improvement in the sport of harness racing; to advise its own members and other associations and individuals interested in the sport of harness racing with respect to problems arising in connection therewith, including but not limited to legal problems, legislation, taxes, regulations, rules and rulings, and interpretations thereof; and to act as a clearing house for the exchange of information among various associations, corporations and individuals interested in the sport of harness racing and to assist in all legal ways such persons, corporations and associations.

Members of Harness Horsemen International, Inc., consist of membership corporations or unincorporated

associations of harness horsemen, formed under the laws of any state, province or country who represent the horsemen racing at the pari-mutuel track or tracks recognized by the United States Trotting Association in the United States or the Canadian Trotting Association in Canada. At the present there exist Harness Horsemen Associations in 16 different States and 2 in Canadian Provinces with a total number of horsemen and other individuals dependent and representative of the harness horse industry in excess of one million persons.

As a non-profit corporation, Harness Horsemen International, Inc., through its various Associations, provides to the grooms, second grooms, trainers, second trainers, drivers and other licensees, adequate benefits by way of health and accident insurance, disability and life insurance and some associations at the present provide for a pension plan.

The question presented in the instant case is a matter of continuing importance to Harness Horsemen International, Inc. Briefly stated, the question is whether Section 8022 of the Unconsolidated Laws of the State of New York is unconstitutional for two distinct reasons, to-wit: (1) it allows or permits the state to irreparably sanction a harness race horse licensee (owner, driver, trainer, second trainer, groom, second groom, hot walker, exercise boy, blacksmith, veterinarian, concessionaire and Associations which conduct racing meets), without a pre-suspension or a prompt post-suspension hearing in violation of Appellee's right to due process; (2) it prohibits stays of execution of suspension orders pending review in cases of harness racing without a parallel prohibition in thoroughbred racing cases in violation of Appellee's right to equal protection.

The interest of Harness Horsemen International, Inc., is thus predicated on the substantial and far-reaching consequences that any decision here regarding meaningful due process and equal protection under the Fourteenth Amendment to the Constitution of the United States may have for all harness race licensees. Harness Horsemen International, Inc., is also concerned that this Court should be aware of the manifold ramifications of Section 8022 of the Unconsolidated laws of the State of New York and similar statutes in 12 other states which may affect the substantial rights for all harness race licensees wherever they may find themselves. See Page 5 of Jurisdictional Statement.

For these reasons, Harness Horsemen International, Inc., requests this opportunity to present its views on the instant case to this Court.

Conclusion

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *Amicus Curiae* brief in the present case in support of the position of the Appellee.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Questions Presented	1
Statute Involved	2
Statement of the Case	2
Introduction to Argument	2
Summary of Argument	5
Argument	6
Conclusion	17

TABLE OF CASES

Armstrong v. Manzo, 380 U.S. 545 (1965)	10
Barchi v. Sarafan, 436 F.Supp. 775 (1977)	5, 9, 15
Bell v. Burson, 402 U.S. 535 (1971)	7, 10
Carey v. Population Service International, — U.S. —, 52 L. Ed. 2d 692 (1977)	16
Dixon v. Love, 431 U.S. 105 (1977)	14, 15
Goldberg v. Kelley, 397 U.S. 254 (1970)	7
Mathews v. Eldridge, 424 U.S. 319 (1976)	7
Morrissey v. Brewer, 408 U.S. 481 (1972)	7
Shapiro v. Thompson, 394 U.S. 618 (1969)	16
Shelley v. Kraemer, 334 U.S. 1 (1948)	16
Williamson v. Lee Optical of Oklahoma, Inc., 384 U.S. 483 (1955)	16

Page

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES CITED

Fourteenth Amendment 1, 17

McKinney's New York Unconsolidated Laws
§7915 15
§8022 ..... 2, 5, 15, 16

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On Appeal from the United States District Court for the Southern District of New York

BRIEF *AMICUS CURIAE* OF THE HARNESS HORSEMEN INTERNATIONAL, INC.

INTEREST OF *AMICUS CURIAE*

The interest of *Amicus Curiae* is set out in the Motion for Leave to File, *supra.*

QUESTIONS PRESENTED

1. Does a state statute that allows or permits the state to summarily and irreparably sanction a harness horse race licensee without a pre-suspension or a prompt post-suspension hearing deny him his right to due process clause under the Fourteenth Amendment to the Constitution of the United States?

2. Does such a state statute that prohibits stays of execution of suspension orders pending review in cases of harness horse race licensees without a parallel prohibition in thoroughbred racing cases violate his rights and provisions of the equal protection clause under the Fourteenth Amendment to the Constitution of the United States?

STATUTE INVOLVED

We incorporate and adopt McKinney's New York Unconsolidated Laws, Section 8022, 1977-78 Supp., p. 177, as reproduced on pp. 3 and 4 of Appellants' Brief, and at footnote 1 of District Court's opinion, at page 4a of Jurisdictional Statement.

STATEMENT OF THE CASE

We incorporate and adopt the Statement of the Case as set forth in both the Motion to Affirm Judgment and the brief of the Appellee.

INTRODUCTION TO ARGUMENT

As *Amicus Curiae* we take a very definite and strong position in this case. To better understand our firm position, an explanation of the everyday events involving trainers, grooms, drivers and owners training their respective harness horses at the various race tracks is not only in order but a must.

Trainers and grooms, well in advance of the appointed or carded date of the race in which horses compete for substantial purses, prepare schedules for their respective horses.

These schedules list on a bulletin board or blackboard the names of the horses, the days of the week and workout plan for each horse during the current week.

Responsible trainers and grooms maintain these charts and schedules listing the schedule of jogging and training. Further, records are maintained with respect to not only the time a horse trained the entire mile, but also the timings at the first quarter pole, half mile pole, three quarter pole and the final quarter. Great weight is placed on the horse's ability and speed in training, especially on the second fractions after the half mile and more particularly the last quarter mile. All of the foregoing, together with other expertise on the part of the trainers and grooms, is with purpose. This is all done to prepare a horse for the actual race day the horse will race in a competitive race at a pari-mutuel race track for a substantial purse. In horse people parlance this is referred to as getting a horse "ready" for the race date.

Trainers do employ other subordinates such as grooms, second grooms, second trainers, hot walkers and exercise boys because in most instances they train any number of horses participating in a meet at a particular pari-mutuel race track for a particular time period.

The value of these horses is considerable and the purses for which they compete also is considerable.

It is the purses that horses earn which in a large degree contribute to the livelihood of the owner, trainer and all subordinate licensees.

Therefore, any suspension of a licensee, of necessity interferes with the orderly training schedule heretofore described. A disruption of training and racing schedule does affect not only the horse but ultimately, in the event

the horse is not "ready", the trainer, driver, owner and all subordinate licensees are also deprived of earnings and thus their livelihood is affected. Suspension of licenses, even if for short intervals, does cause serious and severe impact on trainers, drivers and owners.

Suspensions, incidentally, have been and are imposed on trainers, owners, drivers, grooms and other licensees by the various Racing Boards in the various states conducting harness horse racing meets at pari-mutuel race tracks for a variety of reasons. The following is a list of some of the rules and regulations for which suspensions are imposed: failure to maintain financial responsibility; association with undesirables; driving with indifference or lack of effort; driving with design not to win, or in a manner inconsistent with an attempt to win; a trainer's responsibility for the condition, fitness, equipment and soundness of each horse at the time it is declared to race and thereafter when it starts in a race; and the trainer's responsibility at all times for the condition of all horses trained by him.

The foregoing serve as a sampling of a few of the rules and regulations which could lead to a licensee's suspension that govern in many states where pari-mutuel racing is permitted.

It is, therefore, of utmost importance that the laws in the 12 various states heretofore referred to governing suspensions of licenses provide a meaningful constitutional pre-suspension or prompt post-suspension hearing within the framework of the Due Process Clause.

We offer the foregoing introductory observations of the everyday goings on in the harness horse racing industry in an effort and as an aid to better understand the

arguments in support of the Appellee, and our position as *Amicus Curiae*.

SUMMARY OF ARGUMENT

I

A state statute such as Section 8022 of the Unconsolidated Laws of the State of New York should permit and allow a harness horse race licensee a pre-suspension or a prompt post-suspension hearing. The summary suspension of the license of a harness horse race licensee by the State as in the case before this Court pending hearing and determination of disciplinary charges denies such harness horse race licensee due process of law and thereby deprives him of his substantial right to earn a livelihood.

II

A state statute that prohibits stays of execution of suspension orders pending review in cases of a harness horse race licensee without a parallel prohibition in thoroughbred racing is violative of his rights under equal protection of the law. In this case, the Three-Judge District Court for Southern District of New York as reported *sub nom. Barchi v. Sarafan,* at 436 F.Supp. 775 (1977), and reproduced in the appendix to the Jurisdictional Statement beginning page J.S. 3a., held and was justified in holding that Section 8022, *supra,* was unconstitutional because it permits the State to summarily and irreparably sanction a harness horse race licensee without a pre-suspension or a prompt post-suspension hearing violative of his rights to due process. The same Court held, and was justified in holding, that the prohibition of stays of execution of suspension orders pending review of cases of a harness horse race licensee with-

out a parallel prohibition in thoroughbred racing is violative of his right to equal protection of the law.

ARGUMENT

I. THE NEW YORK STATUTE DENYING A HARNESS HORSE RACE LICENSEE A PRE-SUSPENSION OR A PROMPT POST-SUSPENSION HEARING IS VIOLATIVE OF DUE PROCESS OF LAW.

The summary suspension of the license of the Appellee John Barchi, in this case, pending hearing and determination of disciplinary charges, denies him due process of law in that it summarily and irreparably deprives him of his right to earn a livelihood.

A certain degree of legality and precision of procedure must be observed when an administrative body such as in this case the New York State Racing and Wagering Board performs a judicial or quasi-judicial function. This, indeed, is very necessary in order that evidence of the contending parties may be fairly and fully presented and, further, that the particular administrative body may be adequately advised with regard to the claims of the respective parties. Certain procedural formalities are so embedded in our system of administration of justice that we regard them as guaranteed by the due process of law provisions of our constitutions.

The paramount test of the presence or absence of due process of law in any administrative procedure is the presence or absence of the basic rudiments of fair play long established in our law.

Two essential ingredients to due process are notice and hearing. Concerning due process, this Court held that: "[it] is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471 at 481 (1972). This Court demonstrated its unique concern for those destitute and poverty stricken individuals whose very existence depends on public assistance. The depriving of a protected interest which involved the termination of welfare benefits mandated a hearing. See, *Goldberg v. Kelley,* 397 U.S. 254 (1970). Again it is made abundantly clear that due process applies in the summary suspension of a driver's license for failure to post security sufficient to satisfy an unadjudicated tort claim. In *Bell v. Burson,* 402 U.S. 535 at 539 (1971), this Court stated:

> "Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without procedural due process required by the Fourteenth Amendment."

Whether an evidentiary hearing was required before the termination of disability benefits under the Social Security Act presented an issue in the case of *Mathews v. Elridge,* 424 U.S. 319, 333 (1976), namely, "the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter." The factors which were considered in the evaluation of the procedure satisfying due process of law was also enunciated in *Mathews v. Eldridge, supra,* as follows:

> "Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, our prior decisioins indicate that identifi-

cation of the specific dictates of due process generally require consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

The private interest is plainly and simply, the licensee's right to a livelihood. We have in this case a summary punishment with irreparable injury to the trainer. Once his license is suspended, every racing day lost by the said trainer cannot be replaced, regained or recaptured. The disruption of the training schedule of the horses; the loss of some or all of his owners; the loss of employees; and all other losses which contribute to the loss of income and livelihood to the trainer, once lost, as a result of such a suspension as in this case, can never be made whole again.

The owners that employ the licensee trainer under suspension are also unjustly punished and penalized. So long as their horses remain stabled with the suspended licensee and so long as they employ said suspended licensee trainer, these innocent owners are forbidden and prohibited from competing and carding their horses at parimutuel race tracks in what in most cases amounts to substantial purses. The innocent owner thus finds himself between two equally hazardous alternatives of, "Scylla and Charybdis" of the classic days or, "Catch 22" of modern times. In the event the innocent owner terminates the employment of the suspended trainer licensee and transfers his horses to another new trainer, the disrupting of the horses' schedule together with the time necessary for the new trainer to adapt to the new horses, all contribute to and cause further delay in getting the horses "ready," thereby causing irreparable and substantial loss to the innocent owner. On the part of the suspended licensee trainer, in most cases, once an owner leaves him the possibility of return is very minimal and in most instances permanent. The same holds for employees, once an exodus of horses occurs, an exodus of employees of necessity follows, which usually remains permanent. New relationships usually strengthen and grow into permanent ones. Good name, general reputation and status also serve as contributing factors to the loss of income and livelihood which cause irreparable and substantial damage to the suspended trainer licensee. Once this occurs any future vindications or reversal of suspension in the ultimate hearing is not sufficient to wipe out the stigma or cure the irreparable damage and injury caused said suspended trainer. His losses are not only gone and lost forever, during the suspension, but in some instances a trainer may be wiped out of business completely and permanently without the choice of two equally hazardous alternatives.

It is repelling and shocking to the conscience, for an Agency, Board or Commission to show such disrespect for an individual's rights, while under the guise of the public interest, such a body would rationalize its summary and definitive power so clandestinely as to indelibly cast its mark and ruin the character and reputation of innocent individuals together with guilty individuals. The opinion of the Three-Judge District Court for the Southern District of New York, *sub nom. Barchi v. Sarafan, supra,* stated:

> "There is an inherent revulsion against a system which, as has occurred in this case, favors quick sanctions, even in the face of a demonstration of inno-

cence, at the expense of an accurate determination of responsibility. In the present case, the plaintiff submitted himself to two polygraph examinations, one at the Board's behest. Both examinations indicated plaintiff's innocence in the drugging of 'Be Alert'. There would appear to be little more that the plaintiff could have done to demonstrate a lack of culpability. Nevertheless, the presiding Steward ordered a suspension. No great urgency was apparent here. A hearing prior to administering of sanctions, or a stay pending review, would have given the Commission the opportunity to review the Steward's action. The opportunity to be heard in review of a state sanction must be available in a meaningful manner and at a meaningful time. *Armstrong v. Manzo,* 308 U.S. 545, 552 (1965). On balance, the Court concludes that the absence of either a pre-suspension hearing or a prompt post-suspension hearing denies plaintiff the meaningful review due process requires. *Bell v. Burson, supra; Armstrong v. Manzo, supra.*"

Although we agree that the interest of the state and public should be considered, we do not conclude that the interest of the state and public should overshadow the private interest of the trainer licensee, as in this case, to the extent that the denial of a stay renders any future reviewing process a meaningless function and a futile exercise in constitutional due process. The loss in the majority, if not all, harness horse racing suspension cases is not only substantial but also irreparable as we have already indicated.

The risk of an erroneous deprivation in the absence of a prior hearing is great in this case. Barchi, the licensee trainer, did accept the burden of coming forward with proof. He offered his own uncontradicted testimony and the results of two polygraph examinations, one of which was conducted by the Board. Incidentally, in this regard,

it is no secret among horsepeople that Racing Boards in some states have consistently followed the policy of offering polygraph examinations to accused horsemen, disregarding the results if they support the horseman, but relying heavily on them as grounds for finding a violation in the event of failure to pass said test on the part of the horseman. In the case before this Court, there is other evidence in the record and, in fact, Appellants make no claim that there is any evidence of Barchi's guilt. Appellants are reduced, therefore, to a defense of the naked proposition that, merely because he is a trainer, he is guilty and punishable for the illegal medication of the horse "Be Alert," even if he had nothing to do with it or, in fact, knew absolutely nothing about it. It would take strong justification indeed to support such an inherently obnoxious doctrine, and none appears.

It is absurd and illogical to conclude and hold a trainer liable for the drugging of a race horse solely upon the fact that such an event occurred. No person or trainer could possibly watch all of the horses in his or her care or stable for a continuous 24-hour period each and every day. In spite of the tight security at all tracks, a large number of other trainers, grooms, owners, race track personnel, tack, and equipment personnel also have access to the barn and stall area. It would not be too difficult for a discharged second trainer, groom, second groom, hot walker, exercise boy, disgruntled member of the general public, or anyone other than the actual trainer to drug a horse by either injection or orally giving the horse medication through the mouth or placing a drug in the feed. There have been reported cases in the past and there probably will continue to be reported cases in the future of dissatisfied and disgruntled former employees of a

trainer or disgruntled members of the general public who without the knowledge or consent of the trainer have in the past, or will in the future, administer a drug to a horse. Cases of this type have occurred in spite of the tightest of security at all race tracks.

Bluntly but accurately put, what Appellants propose is to hold the trainer as a hostage; if certain disapproved events occur, regardless of their authors, the trainer is to be offered up as a sacrifice. If ever there was a concept universally condemned by every civilized society, this is it. Not only cannot it be justified, but the arguments offered by the New York State Racing and Wagering Board in its support are even more appalling.

The Board makes much of the fact that they must exercise this power of suspension immediately and forthwith because of the state and public interest involved. It is difficult to reconcile this position of exigency and urgency in this case in the light of the 16 days that elapsed before the Board imposed its suspension. The Board's inaction and failure to act with prompt dispatch until the lapse of 16 days further demonstrates its lack of logic and inconsistency.

The Appellants in this case have argued that swift, even Draconian, enforcement is a necessary and indispensable weapon in the regulation of the harness horse racing industry. They have contended swift action is necessary and hence they have argued against the due process challenge.

To this we counter that there are about 38 states that permit pari-mutuel racing. Not all of those states are similar in their procedure as in this case. In spite of the fact that a licensee is offered a meaningful hearing before

suspension in those states, horse racing has not suffered any nor have the race tracks in those states been forced to shut down their operations. Racing has flourished in those states without any major scandals or corruption, contrary to what the Appellants would have us believe.

It is difficult to understand, rationalize and constitutionally reconcile the lack of a parallel in any other field of endeavor. It appears that only the field of harness horse racing has been and is singled out for swift Draconian treatment.

Lawyers, while under indictment, are permitted to practice law; doctors, osteopaths, chiropractors, psychologists, real estate brokers, and countless of others do not face the same Draconian treatment in the face of a alleged violation of a rule, regulation or law, as we find in this case where Barchi has been singled out. We find no other parallel as this in any other profession.

It would well behoove the New York State Racing and Wagering Board along with the other Racing Boards that have singled out the harness horse racing industry for Draconian treatment to heed the words of the great Irish statesman and orator, Edmund Burke: "I do not know the method of drawing an indictment against a whole people."

This Court by giving heed to the words of Burke, the orator and statesman, can through its pronouncement, put an end to the Draconian treatment accorded the horse racing industry and restore horsemen and especially harness horsemen to the status of first class citizens.

We are told that this rule, denying a pre-suspension or a prompt post-suspension hearing, is necessary to preserve the "appearance" of honesty, to deter fraud or to prevent

loss of public confidence. Apart from the concern for the cosmetic effect of their action, rather than a judgment based upon evidence, we may ask with whose appearance the Board is concerned, *mostly its own*. A positive test occurs, the trainer is suspended, the public gets the impression of an alert, on-the-ball Board which has conducted a competent investigation exposing the facts and the wrongdoer. Presto, the Board is now off the hook. Actually, this is a deterent to thorough investigation, first, because as in the old Gilbert and Sullivan refrain, "a victim has been found," and second, because a thorough continuing investigation which turned up the actual culprit, would be an embarrassment to the Appellants, who would then find themselves in the position of having punished an innocent man.

We are also told that this procedure is necessary and helpful to efficient enforcement. This can be disposed of out of hand. There is not a police agency in the world which could not (frequently does) claim that it could operate much more efficiently and successfully, free of the constitutional restrictions imposed upon it by our Constitution, Courts and Legislatures. But we have long since emphatically decided that this is an unacceptable price for "efficient" police work.

The Appellants in their brief place great emphasis and weight on the case of *Dixon v. Love,* 431 U.S. 105 (1977). This Court did approve of the summary suspension of a driver's license because of statutory designated number of traffic offenses and convictions. *Dixon v. Love, supra,* is not analogous nor is it germane to the issues of this case before the Court. In the *Dixon* case the petitioner was accorded and afforded a hearing on each and every offense prior to his conviction and prior to the loss of his driver's

license. A denial of a further hearing would in no way abridge Petitioner's right to due process. Since the State Legislature did provide for a limited license allowing the Petitioner an occupational license to drive in the course of his employment, necessary to his livelihood, this Court rightfully permitted the summary suspension of the license. In the case before this Court we do not have a similar provision for an occupational license, nor do we have any type of pre-suspension or prompt post-suspension hearing. Therefore, *Dixon v. Love, supra,* does not apply.

II. THE NEW YORK STATUTE THAT PROHIBITS STAYS OF EXECUTION ORDERS PENDING REVIEW IN CASES OF A HARNESS HORSE LICENSEE WITHOUT A PARALLEL PROHIBITION IN THOROUGHBRED RACING IS VIOLATIVE OF EQUAL PROTECTION OF THE LAW.

The Three-Judge District Court for the Southern District of New York *sub nom. Barchi v. Sarafan,* 436 F.Supp. 775, *supra,* ruled that Section 8022, *supra,* violated the due process of law clause in that Section 7915 of the Unconsolidated Laws of New York do not prohibit stays of execution of suspension where charges are preferred against thoroughbred race-horse licensees, while stays are prohibited for harness racing licensees.

Both harness and thoroughbred racing in the State of New York come within the jurisdiction of the New York State Racing and Wagering Board. The Appellants in this case, the Board, were afforded an opportunity to justify a distinction between the two classes of licensees. They did not come forward with any proof or any rational basis to justify their distinctions between the two

classes of licensees. It is incumbent on the State to "show" an "underlying" . . . interest to which its discrimination . . . can be rationally related". *Shapiro v. Thompson,* 394 U.S. 618 (1969).

See also, *Carey v. Population Service International,* — U.S. —, 52 L. Ed. 2d 692 (1977), where this Court stated:

> "It is enough that we again confirm the principle that when a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant State policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy."

Chief Justice Vinson in the case of *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948), stated:

> "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

And it was Justice Douglas who said in *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 485 (1955),

> "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

Since the Appellants have failed to demonstrate any rational basis for the discriminatory classifications, and the difference in treatment afforded harness and thoroughbred licensees, there is no question but that there exists in this case an indiscriminate imposition of inequalities. Therefore, we respectfully submit that the prohibition of stays pending review in harness racing is a denial to the Appellee of equal protection of law.

We submit that the District Court below, in declaring that Section 8022, *supra,* is unconstitutional in that it is

violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, did so in a constitutionally correct, proper and sound manner.

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

Dated: Milwaukee, Wisconsin, July 12, 1978.

Respectfully submitted,

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